IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No. 1229 of 1984

For Approval and Signature:

HONOURABLE MR.JUSTICE M.R. SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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JAGMOHAN RAICHAND MODI - Appellant(s)
Versus
SHANKERLAL ISHWARLAL PATEL & 1 - Defendant(s)

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Appearance :
MR PV NANAVATI for Appellant(s) : 1,
MR SURESH M SHAH for Defendant(s) : 1,
MR KV SHELAT for Defendant(s) : 2,

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CORAM : HONOURABLE MR.JUSTICE M.R. SHAH
Date : 03/08/2006

ORAL JUDGMENT

Present appeal has been filed by the appellant herein, original-objector, challenging the order dated 1st October 1983 passed by the learned Judge, City Civil Court at Ahmedabad, in

dismissing Civil Misc. Application No. 256/82 and by which the applicant, 3rd party has submitted his objections in the Execution Application No. 834/80.

2. The respondent No.2 herein, M/s. Cheldas Jethalal Patel was a Judgment-Creditor of Civil Suit No. 5/1978 confirmed in First Appeal No. 407/80, and the respondent No.1 herein is the Judgment-Debtor against whom the decree for possession of the property in question was passed. The judgment-creditor filed Execution Application No. 834/1980 under Order 21 Rule 58 of the C.P.C. It is required to be noted that during the pendency of the suit there was already an attachment over the property in question. The appellant-herein [hereinafter referred to as 'the applicant'] submitted his objection in the Execution Application No. 834/80 being Civil Misc. Application No. 256/82 for quashing and setting aside the order of attachment in the

decree passed in Civil Suit No. 5/1978 and further prayed for stay of operation of attachment order and further consequential proceedings in Darkhast Application No. 834/80. It was alleged by the applicant that by agreement of sale dated 9th September 1976 the Objector and one Kantilal Ramchand Modi had purchased the attached property for Rs. 65,000 from the judgment-debtor, Smt. Shantaben and other minors through their natural guardian, Shankarlal Patel and also Umedbhai Shankarlal Patel and against the sale consideration amount of Rs. 43,375.28 ps., was paid and only an amount of Rs. 21,624.72 ps., remained outstanding. It was further alleged that they were ready and willing to pay remaining amount in the Court. It was further submitted that as per the agreement dated 9th September 1976 he was having a right to get specific performance of the said agreement to sell from the defendant judgment-debtor and his family members. It was further alleged that the

judgment-debtor and others have already put the plaintiff in possession of the said property and therefore it was requested to grant the relief as prayed for.

3. The Objection Application was opposed by the judgment-creditor by filing Application at Exh. 19 contending inter alia that the application was not maintainable as it was filed in collusion with the judgment-debtor. It was further contended that Agreement to Sell was fabricated and ante-dated as there was an injunction of the Hon'ble Court from selling the said property. It was further submitted that the judgment-decree had given an undertaking before the Hon'ble High Court that from 1st July 1980 he will go on depositing Rs. 1500 towards decretal amount every month and no amount was paid inspite of that undertaking. It was also further submitted that the execution was at the stage of notice for public auction. It was further

contended that the judgment-debtor has never referred to the alleged agreement to sell to the applicant and the public notice was served and affixed on the property and when the publication was made by beat of drum, at that time also the judgment-debtor has not referred to any rights under the Banakhat of applicant nor any objection was taken within time. It was further submitted that the applicant was never put to possession as alleged in 1978 and thereafter in 1980 and therefore it was requested to dismiss the application with costs.

4. The learned Trial Judge raised the Issues/points for consideration at Exh. 26. The applicant himself was examined at Exh. 28 and he examined one Popatlal J. Patel at Exh. 48. The judgment-creditor examined himself at Exh. 53. On appreciation of evidence, the learned Judge dismissed the application, and the objections submitted by the applicant, and held that the

attachment was duly executed on 23.2.1978, and the trial Court has also held that the alleged agreement to sell is doubtful and created suspicion, and that it was not proved that any consideration was paid. The learned Judge further held that the alleged agreement to sell dated 9th September 1976 was created by the applicatn and the judgment-debtor in collusion with each other to deprive the judgment-creditor of his rights. It was further held by the learned Trial Judge that the applicant was not in possession of two rooms and Osary of the ground floor of the suit property in February 1978 as alleged. The learned Trial Judge also further held that the applicant was entitled to possession by the judgment=debtor somewhere in June 1981 or thereafter but not prior to that. The learned Trial Judge also further held that possession was not handed over to the applicant as alleged and there was no part performance of the agreement to sell as alleged by the applicant

and therefore no interest was created in the suit property in favour of the applicant. Being aggrieved and dissatisfied with the impugned order passed by the learned Judge, City Civil Court at Ahmedabad, in dismissing the aforesaid Civil Misc. Application, the applicant, 3rd party objector has preferred the present Appeal.

5. Mr. Vibhuti Nanavati, learned advocate appearing on behalf of the appellant has submitted that the learned Judge has misinterpreted Section 53-A of the Transfer of Property Act. He has further submitted that the learned trial Judge has erred in coming to the conclusion that Exh. 31 Agreement to Sell was ante-dated and made with a view to defeat the claim of the judgment-creditor. It is further submitted by him that the learned trial Judge has materially erred in coming to the conclusion that possession was handed over somewhere in June 1981 or thereafter but not prior thereto and that has

resulted into miscarriage of justice. It is, therefore, requested to allow the present Appeal.

6. The Appeal is opposed by Shri KV Shelat, learned advocate appearing on behalf of judgment-creditor. It is submitted that on appreciation of evidence the learned trial Judge has rightly dismissed the application. It is submitted by him that as the entire agreement to sell was typed except the date and the date was subsequently put which shows that the agreement to sell was ante-dated and therefore the learned trial Judge has rightly disbelieved the said theory of agreement to sell. It is further submitted by him that considering the fact that though the applicant being a Government servant not a single amount was paid by cheque and the entire amount was alleged to have been paid by cash, which was not believable more particularly when the applicant has failed to establish that he was having sufficient amount at the relevant

time when he made the payment and therefore the learned trial Judge has rightly disbelieved the theory of agreement to sell. It is further submitted by him that the learned trial Judge has rightly disbelieved that the applicant was put to possession in 1978 more particularly considering the fact that the order of attachment and the summons were served on the judgment-debtor at the property in question, and the learned trial Judge has rightly held that the applicant was put to possession only in June 1981. It is submitted that objections were raised that submission of application was absolutely in collusion with the judgment-debtor with a view to defeat the rights of the judgment-creditor. It is, therefore, requested to dismiss the present Appeal with costs.

7. Decree-holder filed Summary Suit No. 5 of 1978 on 21st February 1978 and on that very date order of attachment-before-judgment against the

suit property, i.e., Bungalow No. 11 at Panna Park Society was issued and was executed on 23rd February 1978. On the suit being decreed, the judgment-debtor filed First Appeal No. 407/1980 before this Court whereon on 25.4.1980 a consent-decree came to be passed on following lines;

> "The suit is decreed with costs, for an amount of Rs. 30,290/- (Rupees thirty thousand two hundred ninety only) with 6& interest on the principal amount of Rs. 26,000/- (Rs. Twenty-six thousand only) from the date of the suit till the date of payment. Attachment levied before judgment under O. 38 Rule.5 C.P.Code granted vide exh.5 is made absolute and it will continue till satisfaction of the decree. The appellant(defendant) will pay the

> decretal amount by monthly instalments of Rs. 1,500/- (Rs. One thousand five hundred only) each. The first instalment will be deposited in the Court of Civil Judge, S.D. Mehsana on or before 1-7-1980, and the remaining instalments will be deposited in the first week of every succeeding month. If the appellant commits default in payment of any two instalments, the whole of the remaining unpaid decretal amount will become due and payable in execution of the decree."

It appears that as no installment was paid as per the Consent Terms, the judgment-creditor filed Darkhast Application No. 834/1980. After overcoming successfully all the objections factual and technical, the judgment-creditor

reached the stage of auction of the suit property. It appears from the record that various contentions and objections were raised by the judgment-debtor at different stages and all were ruled out. It appears that as a last resort present appellant submitted his objections as third party in the aforesaid Darkhast Application claiming his right on the basis of the alleged agreement to sell dated 9th September 1976 and it was the case of the Obstructor that judgment-debtor had parted with possession of the property and therefore right is created in his favour. Normally, Agreement to Sell does not confer any right, title or interest in property subject to part-performance if any and/or possession is handed over. The learned Trial Judge, on considering the evidences, held that the attachment was duly made on 23rd February 1978 and all the necessary procedure was followed which was required to be under the provisions of the Civil Procedure Code. On going through the

entire record, I am in complete agreement with the reasoning and finding of the learned trial Judge holding that it is established that attachment was duly levied on 23rd February 1978.

8. Now, so far as the contention on behalf of the appellant that on the alleged date of attachment he was in possession of part of the property and another tenant in possession of the remaining part of the property is concerned, it is required to be noted that it has come on evidence and on record that at the time when the summons and the attachment order was served on 23rd February 1978 in the premises, the judgment-debtor was found to be in possession thereof. No evidence has been produced to show that in fact the appellant was handed over possession of part of the property and that in rest of the portion tenant was residing. Considering the fact that not a single farthing was paid towards the consideration at the time of execution of the

agreement to sell or thereafter by cheque and the entire payment is alleged to have been made by cash, and considering the other circumstances that the agreement to sell was a typed one and only the date was in 'ink', the learned trial Judge has held that the agreement to sell does not inspire any confidence and that it was ante-dated and it has been created by the appellant and the judgment-debtor in collusion with each other. The learned trial Judge has rightly disbelieved the same and has rightly held that the applicant was not put into possession in the year 1978 as alleged on the basis of the alleged agreement to sell. On appreciation of evidence, the learned trial Judge has further rightly held that no evidence has been produced by the applicant to prove that even in the year 1980 also he was put to possession with regard to some portion of the property. Considering the evidence on record and considering the fact that no Receipt of payment of tax had come on record

pertaining to the years 1978-79, 1979-80 and 1980-81, and considering the other receipts, the learned Judge has rightly come to the conclusion that the applicant was entitled to possession of the property in question somewhere in June 1981 or thereafter but not prior to that in any circumstance of the case. Thus, on overall facts and circumstances of the case, the learned Trial Judge has held that the objections submitted by the applicant are baseless and without any substance which was made in collusion with the judgment-debtor with a view to defeat the rights of the judgment-creditor. On going through the entire record and proceedings. This Court is also convinced that the objections submitted by the applicant were nothing but in collusion with the judgment-debtor with a view to defeat the rights of the judgment-creditor. It is required to be noted that even at the time of consent terms arrived at before this Court and in the interregnum period the judgment-debtor had never

disclosed with regard to the rights, if any, of the applicant and/or in alleged agreement to sell dated 9th September 1976. Under the circumstances, the learned trial Judge has rightly dismissed the claim which is not required to be interfered with.

9. For the reasons stated above, the Appeal is required to be dismissed and it is dismissed. However, there will be no order as to costs. Interim relief, if any, stands vacated forthwith.

[M.R. Shah, J.]

RMR.